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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1956

No. 302

CORNELIUS VANDERBILT, JR.,
Petitioner,

v.

PATRICIA W. VANDERBILT,

and

THOMAS F. McCOY, Receiver and Sequestrator,
Respondents.

PETITIONER'S BRIEF ON CERTIORARI

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Opinions Below

Court of Appeals of the State of New York, 1 N. Y. 2d, 342; (R. 540) Appellate Division of the Supreme Court of the State of New York, First Judicial Department, 1 App. Div. 2d, 3; 147 N. Y. S. 2d, 125; (R. 527) Supreme Court of the State of New York, County of New York (after trial), 207 Misc. 291; id. 294; 138 N. Y. S. 2d, 222; (R. 503-505) Supreme Court of the State of New York, County of New York (upon preliminary motion to dismiss), 133 N. Y. S. 2d, 314 (not officially reported).

Jurisdiction

The judgment of the Court of Appeals was entered on May 31, 1956. Upon remittitur filed, judgment was entered

thereon in the Supreme Court, New York County, and the office of the Clerk of the County of New York, on June 8, 1956. Defendant's petition for certiorari was filed in this Court on August 8, 1956. Certiorari was granted by this Court on October 8, 1956.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

Questions for Review

1. Was full faith and credit denied petitioner's ex parte Nevada divorce decree, by the enactment of New York Civil Practice Act, Section 1170-b, and by its application below in a State which never had jurisdiction of the marital res, as follows:

(a) Permitting respondent, Mrs. Vanderbilt, as plaintiff, after having been divorced, to commence a separation action as a married woman against petitioner, as a non-resident defendant, and to sequestrate his New York property in connection therewith?

(b) Permitting divorced plaintiff to complete a jurisdictional domicile of one year as a married woman, in order to maintain the separation action?

(c) Adjudicating that defendant was guilty of marital misconduct, as the foundation for the maintenance award "as justice may require", after the dismissal of the separation claim upon the grounds that it was barred by the valid Nevada decree? and

(d) Awarding maintenance after the divorce?

2. Does that statute (Sec. 1170-b) and its application below deny full faith and credit to the Nevada decree and deny petitioner the equal protection of the laws in imposing upon him as a non-resident, a post-marital obligation which did not exist in contemplation either at the time of the foreign marriage or the physical separation of the parties?

3. Is that statute and its application below discriminatory in that: it intentionally was designed to meet the evil where a husband procures an ex parte decree of divorce outside of the State of New York; and it may not be applied against a similar New York divorce decree; and it may not be applied in any other New York separation action (not involving severance of marriage) if the separation is denied?

4. Was petitioner denied due process of law under the following circumstances:

(a) Where the publication of process and the papers causing sequestration of defendant's property were classic in form in an action by a married woman for a separation and made no mention of the Nevada divorce decree nor that plaintiff would seek maintenance as a divorced woman?

(b) By the finding of marital misconduct on defendant's part after the dismissal of plaintiff's claim for a separation upon the merits and the denial to him of an opportunity to contest that issue? and

(c) That the basis for award of maintenance after divorce rests solely upon the vague and indefinite phrase "as justice may require" and plaintiff is required falsely to claim in connection therewith that she is a married woman in order to justify the award?

Constitutional and Statutory Provisions Involved

Article I, Section 10, reads, in part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts, . . ."

Article IV, Section 1, reads, in part:

> "Full faith and credit shall be given in each State to the public acts, Records, and Judicial Proceedings of every other State."

Article IV, Section 2, reads, in part:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Amendment XIV, Section 1, reads, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Act:

> "Sec. 1170-b. Maintenance of wife where divorce or annulment previously granted on nonpersonal jurisdiction.
>
> In an action for divorce, separation or annulment, or for a declaration of nullity of a void marriage, where the court refuses to grant such relief by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, the court may, nevertheless, render in the same action such judgment as justice may require for the maintenance of the wife. The court, by order, at any time thereafter upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall direct, may annul, vary or modify such judgment. Subject to the provisions of section eleven hundred and seventy-one-b of this act, the authority granted by this action shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."
>
> Added by L. 1953 ch. 663, effective April 13.

New York Civil Practice Act Sections 232(1), 232-a(5), 1161, 1164, 1165-a, 1166, 1171-a (Appendix: pp. 1a-3a.

Statement

This ex parte separation action was commenced by publication of the summons by respondent as plaintiff and alleged wife and then resident in New York, against the petitioner as defendant and alleged husband and then resident in Nevada. (R. 9) Defendant appeared specially, and objected to the jurisdiction of the Court over his person and of the subject matter. (R. 17) After his preliminary motion to dismiss the action was denied, he preserved his special appearance with the permission of the court, and he answered to the complaint and set up as a bar to the action, his jurisdictional objections and the ex parte decree of divorce previously procured by him against the plaintiff (R. 19-20).

The parties were married in Connecticut in September 1948. There is no issue of the marriage. (R. 12) Defendant then was domiciled in Nevada, and plaintiff then was domiciled in California. (Pl. ex. I; R. 33; Def. ex. F, Par. 17; R. 230) Each had been so domiciled for many years prior to the marriage. (R. 131, 160) By virtue of the marriage, Nevada became the initial marital domicile of the parties, and a few months thereafter they established California as their subsequent marital domicile, which continued until their physical separation in September 1952 (R. 90-95). When married, respondent was twenty-eight years of age, and petitioner, fifty. She had previously been divorced once, and he, four times. (R. 152, 128-129).

On October 1, 1952 the respondent, as plaintiff, commenced a prior separation action against petitioner, as defendant, in the Supreme Court, New York County, founded upon a complaint verified by her while she was in California, in which she falsely alleged the parties to be residents of New York (R. 38, 228). Plaintiff did not actually come to New York herself until December 1952, over two months after the commencement of that prior action. She only was in New York a short while before returning to her domicile in California (R. 95). The prior separation action was dismissed by final order of the

Supreme Court, New York County, dated February 27, 1953, which adjudged that *the parties were not residents of New York State as of October 1, 1952,* and that neither had ever resided in New York prior thereto continuously for one year (R. 506-7; Def. Ex. G; R. 230-1).

On February 12, 1953, the wife came to New York, and allegedly has resided there ever since (R. 96). Thereafter, in March 1953, the husband changed his domicile from California back to Nevada (R. 315-316). He then procured a final ex parte decree of divorce against the respondent in the State of Nevada on June 30, 1953 (R. 22). While said divorce action was pending, respondent made a motion in her first separation action (then pending on her appeal, subsequently dismissed) to enjoin petitioner from proceeding with his said divorce action, and said motion was denied by order of the Supreme Court below dated July 3, 1953 (R. 232; Def. Ex. H; R. 234).

Meanwhile, on April 13, 1953, there became effective New York Civil Practice Act, Sec. 1170-b. One year later, in April 1954, respondent resting her jurisdictional allegation on that one year residence (R. 12), commenced publication of the summons herein against defendant as a nonresident. Respondent had procured an ex parte order from the Supreme Court, New York County, on April 21, 1954, sequestrating petitioner's New York property. Neither said order, nor the papers upon which it was based, made any reference to the divorce (R. 5-17). These papers were served upon defendant in Nevada, (R. 10-11, 394-395).

At the close of plaintiff's case for a separation, the trial Court dismissed the same "upon the merits", (R. 3) with an opinion sustaining the validity of defendant's Nevada residence and to the effect that the separation was barred by the Nevada decree (R. 342). The trial Court then proceeded to take plaintiff's proofs as to the financial circumstances of the parties as a basis for an award of maintenance. It then rendered its second or final opinion which awarded the maintenance (R. 505). Defendant then appealed

to the Appellate Division of the Supreme Court from that part of the judgment which made the awards to plaintiff. Plaintiff cross-appealed upon the principal grounds that the awards were inadequate and that the Nevada divorce decree should not have been sustained. That Court affirmed both appeals and rendered an opinion sustaining the constitutionality of Sec. 1170-b. The Presiding Justice dissented in a separate opinion (R. 539). Both parties then further appealed to the Court of Appeals, which affirmed with an opinion also sustaining the constitutionality of Sec. 1170-b. Two Judges dissented in a separate opinion to the effect that that statute is unconstitutional (R. 548).

A stipulation was made and judicially approved below, dispensing with the printing of exhibits (R. 519). They will be filed with this Court.

Summary of Argument

C.P.A. Sec. 1170-b necessarily required denial of full faith and credit to the Nevada divorce decree because of its mandate that a divorced woman commence a separation action falsely claiming to be married, as a prerequisite to an award of maintenance.

There was a denial of any *prima facie* effect to the Nevada decree severing the marital tie, in the very maintenance of the separation action and the sequestration of defendant's property.

The subsequent finding in this action of misconduct on defendant's part as a basis for a maintenance award under the banner of "as justice may require", after the dismissal of the complaint for a separation "upon the merits", flouted the principle that the Nevada decree is conclusive on everything except jurisdiction.

Full faith and credit also was denied the Nevada decree, because, after having been divorced, plaintiff was permitted

to complete a one year's jurisdictional residence in New York, a statutory prerequisite to the commencement of the separation action as a married woman.

The general common law duty which a husband has to support his wife, and her implied agency to pledge his credit for necessaries when he fails to do so, does not survive severance of the marital tie. The duty of support is not a property right. It is only when it is reduced first to an alimony award and made specific and vested that it survives an ex parte divorce decree.

Sec. 1170-b is discriminatory in that it was intentionally designed by the New York Legislature only to apply to out-of-State ex parte divorce decrees. A similar New York divorce decree would be conclusive until set aside, and no woman would be permitted to commence a separation action in the face of it, claiming that she still is married; nor could she be awarded alimony in any other separation action, not involving severance of the marital tie, if the main relief of separation be denied.

The combination of the publication of the summons in this ex parte separation action, coupled with the sequestration of defendant's property upon the grounds that he was a nonresident, producing the award under Sec. 1170-b, were in themselves a snare for the nonresident since that combination of proceedings could not be directed against a New York husband who had procured a similar ex parte divorce decree.

The seizure of defendant's New York property together with the publication of the summons entitled "Action for Separation", were made without due and proper notice to the nonresident defendant that a divorced woman would seek maintenance as such, under Sec. 1170-b. The judgment rendered did not conform to the process.

The refusal of the trial Court to instruct defendant as to how he was to proceed to oppose an award "as justice may require" and its finding of marital misconduct on his

part, although dismissing the complaint denying the separation which was sought upon the grounds of that alleged misconduct, denied him a fair trial.

The statutory requirement that the woman must have been the subject of *ex parte* divorce and nevertheless falsely claim that she still is a married woman and seeks a separation, in order to procure maintenance, "as justice may require", is indefinite and obnoxious to due process.

POINT I

Full faith and credit was denied the Nevada decree.

A. Very Little Faith and Credit—Plaintiff's Maintenance of the Action as if Still Married.

The basic evil of Section 1170-b is that it contains an immoral and inexorable command to deny full faith and credit to an out-of-State *ex parte* divorce decree. If a woman has been validly divorced elsewhere, she is instructed by that statute to commence a separation action, falsely claiming that she still is a married woman, so that only if the action is dismissed because of the already known to exist divorce, she then may receive an award of maintenance.

The extremity to which the statutory means was carried is rather startling. It pervades this entire case. Unless set aside by this Court, it sets a flagrant style for other divorcees, and a chaotic precedent for abridgment of right.

As the proofs and findings made disclose, there was no real dispute below concerning the validity of defendant's Nevada domicile. The trial court found Plaintiff's contravening proof, "meager", (R. 343). The Appellate Division found it to have "little substance", (R. 538). By operation of law, upon the marriage Nevada became his wife's domicile as well[1]. After a subsequent brief married life with plaintiff

[1] *Matter of Daggett*, 255 N. Y. 243, 246; *Gray* v. *Gray*, 143 N. Y. 354, 359.

as domiciliaries of California, defendant merely resumed his former domicile.

Plaintiff had made no mention whatsoever of the existence of the Nevada divorce decree in her complaint or in her papers seeking publication of the summons and sequestration of defendant's property in New York (R. 5-17). Nor did plaintiff in fact signal any actual attack herein upon defendant's Nevada decree, until prompted by the Trial Court to do so at the close of her *prima facie* case, which was permitted to be reopened for that purpose (R. 268-271).

This abuse flowered with the surprising remark by the trial Justice to the effect that it was of no moment that plaintiff had failed by those preliminary omissions to impart to the Court knowledge of the existence of the divorce decree (R. 393-394).

Thus, defendant was deprived of the *prima facie* effect of the Nevada decree and plaintiff permitted sequestration and publication as though a married woman. It is by these ex parte methods that plaintiff was so richly rewarded below, and defendant calumniated by additional appellate judicial finding below that he was a cruel husband (R. 537-538, 547). This was done to place the award under the banner "as justice may require" and was made in the face of the previous opposite finding of misconduct on the wife's part by the Nevada Court. It contradicted the trial Court's dismissal of the separation claim "upon the merits" (R. 344, 3). The finding below of misconduct on petitioner's part was contrary to the ruling in *Williams v. North Carolina*, 325 U. S. 226, 229, to the effect that the divorce judgment is conclusive on the merits as to everything but jurisdiction. If this were not the rule there would be no finality to the severance of the marital relation. Both spouses, in such case, could procure successive ex parte divorce decrees against each other in different states.

This Court is here presented with the implicit statutory pronouncement applied below, that the Nevada decree need

not be given full credit; and that this plaintiff and all other women similarly situated, may be treated as married women for the purposes of maintaining the action, although admittedly divorced.

It will be noted that Civil Practice Act, Sections 1165-a(3) and 1166, which were enacted long before Section 1170-b had any incipiency, relate to the right of a married woman (and not a divorced woman) to establish a residence for the purposes of commencing a separation action. Civil Practice Act, Sec. 1161, specifies the grounds upon which a separation action may be brought ". . . by a husband or wife against the other party to the marriage . . .".

We believe it to be an irrefutable proposition that, as applied below, the Nevada decree was given no faith and no credit. In order that the action might be maintained by a so-called married woman, the courts below blinded themselves to the existence of the Nevada decree dissolving the marriage.

Even if the marriage obligation be philosophically fractured into two ties, the one marital, and the other economic, faith and credit must at least be given to the cancellation of the marital tie. That faith and credit may not be suspended by a State Legislature which seeks a devious means of reviving the dead marriage for the purposes of securing benefits to the wife through raising the ghost of a departed relationship.

The permissive maintenance of the separation action in itself was a denial of full faith and credit. Upon it rested the claim to further relief by way of financial award. Without the assertion of the present existence of the marriage there could have been no separation action herein and as a result there could have been no compliance with Sec. 1170-b.

It well has been said that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure, and

that this requires ever watchful supervision by the Courts against statutory encroachments upon the rights of the citizen. *Boyd* v. *United States*, 116 U. S. 616, 635; 29 L. ed. 746, 752.

B. Part-Time Faith and Credit—Plaintiff's Completion of New York's Domiciliary Requirements as if Still Married.

There is another bewildering aspect of this action, equally if not more obnoxious to a proper concept of full faith and credit. Although Mrs. Vanderbilt was validly divorced on June 30, 1953, after having only commenced her New York residence a few months before then on February 12th of that year, yet she was permitted thereafter to fill out the New York jurisdictional prerequisite of a one-year continuous domicile as a condition for the maintenance of a separation action by a married woman.[2] (R. 220-222)

What has happened herein appears to us to defy plain logic and common understanding. The New York statute says that a married woman must dwell within New York continuously for one year as a condition for the commencement of a separation action. How can it permit a woman to complete that one year and to maintain a separation action as a married woman, if she already has been validly divorced many months before? Her status as a wife has been dissolved.

A validly divorced woman is not a wronged wife who may export the marital res into another state and unilaterally effect a new matrimonial domicile.

The majority below said that it need not decide whether Mrs. Vanderbilt would have the same right to sue for a separation and establish a one-year residence under Civil Practice Act, Sec. 1165-a, after divorce (R. 546). But is that not a crucial test herein? If the former wife could not establish residence as a married woman after divorce, how

[2]Civil Practice Act, Sec. 1165-a(3).

may she be permitted to establish a goodly portion of that one year residence after divorce?

This is not a very honest piece of legislation, which makes the State a winking party to a pretense with a woman that she is still married, knowing well that it proposes to dismiss her action because she is not. The farce of the situation is that the Court below, in following the statute, sustained the dismissal of the separation action at the close of plaintiff's case, holding that full faith and credit required that this be done in consequence of the Nevada decree. But the Courts below refused to dismiss the separation action as of the outset, (133 N. Y. S. 2d, 314), even though plaintiff then was unmarried, and had not challenged the Nevada divorce, and could not as a married woman complete the jurisdiction prerequisite for the maintenance of the action.

The Courts below erroneously refused to give full faith and credit as of June 30, 1953, when the decree was rendered, and only gave it part time faith and credit as of the close of plaintiff's case. The rule restated in *Davis* v. *Davis*, 305 U. S. 32, 40, that full faith and credit must be given to a judgment at all times since its rendition and not some of the time, was completely ignored.

We are loath to see legislation of clever tricks into the judicial process. Those who betray the truth cannot flee down the labyrinthine ways of the law without betraying themselves. There can be no virtue in such a statute.

C. No Faith and Credit—The Legislative Gift of Support After Divorce.

The economic aspect of the marriage, founded upon a general duty of support, we contend, ceased with the divorce, and unjustifiably was whittled off the Nevada decree.

The Nevada decree (R. 23) is quite clear; not only was the marriage dissolved, but the parties were "... freed and released from the bonds of matrimony and all the duties

and obligations thereof; . . ." and restored to the status of unmarried persons. In *Lynn* v. *Lynn*, 302 N. Y. 193, at p. 203 (cert. den. 342 U. S. 849), New York confirmed that it was the Nevada and New York law that such a decree cut off the right to support even if the Court did not expressly pass on that question in making the decree.

The laws of Nevada, California and Connecticut, the only States having anything to do with the marriage, are very clear, to the effect that the duty to support does not survive such a decree.[3] Except for the procedural indirection of Sec. 1170-b, to be applied only where prior ex parte judgments of marital severance have been procured, the law of New York has not changed its agreement with the latter rule.

We do not question that this Court, in its decision in *Estin* v. *Estin*, 334 U. S. 541, 92 L. ed. 1561, has settled the proposition that where a court of competent jurisdiction having both of the parties to the marriage before it, makes a financial award to the wife, that award is a fixed obligation which cannot be extinguished by a subsequent ex parte divorce decree rendered in favor of the husband in any other State.

Sound principles of res adjudicata always have required that where jurisdiction is had over all parties to an action, the judgment must be deemed forever conclusive as to the matters embraced within its terms. The *Estin* question probably would not have come before this Court were it not for the general understanding that with the dissolution of the marriage fall its obligations. In the *Estin* case, we believe the rule was clarified actually within the limits of res adjudicata, although more was said. The rendering of a support judgment vested the wife with a property interest which could not be swept away by subsequent decree not founded upon personal jurisdiction over her.

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[3] *Sweeney* v. *Sweeney*, 42 Nev. 431, 438-439; *Cardinale* v. *Cardinale*, 8 Cal. 2d. 762, 68 P. 2d. 351; *Calhoun* v. *Calhoun*, 70 C. A. 2d. 233, 160 P. 2d. 923; *Allen* v. *Allen*, 43 Conn. 419.

What we have in this case is quite another thing. The general common-law duty of a husband to support his wife, extinguished according to the laws of Nevada, was revived in New York for the purpose of posthumous liquidation and specification in a State which never had anything to do with the marriage.

In *Armstrong* v. *Armstrong*, 350 U. S. 568, 100 L. ed. 705 certain members of this Court treat of the general duty of the husband to support his wife as some kind of a fixed interest which cannot be extinguished in her absence. (The majority below erroneously deemed this to be the majority ruling of this Court in the *Armstrong* case. R. 545). It seems somewhat inconsistent to effectuate, on the other hand, that an ex parte divorce decree putting aside the wife is of lesser consequence than an inchoate duty to support.

Our argument under this subheading primarily revolves about the legal nature of the support duty. We are not here concerned with clinical analysis of the social aspect of the problem.

A new freedom has been given wives to roam the States and sue where they will.[4] Mrs. Vanderbilt did not choose to take advantage of the Nevada statutes, which provided the financial means for her coming there to litigate the issues.[5] Sparked by the pending legislation of 1170-b, she preferred to travel at her own expense from California to New York. She then let the divorce go by default. Then waiting out New York's one year residence requirement, she commenced this second separation action and seized petitioner's property to enforce her migrant desires herein.

This Court in other cases has moved to protect the wife who stays at home. It should now equally be moved in favor of the one-time husband. We believe that a brake must be applied against this new feminine evolvement of interstate commerce in alimony.

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[4]The majority below erroneously concluded that the husband herein was the first to abandon California (R. 546).

[5]*Ormsby* v. *District Court*, 51 Nev. 339, 276 P. 14.

Despite asseverations below to the contrary, we find nothing determined by this Court subsequent to *Thompson* v. *Thompson;* 226 U. S. 551, 566-567, 57 L. ed. 347, 353, which renders less effective its adjudication in that case that an ex parte divorce decree rendered in favor of the husband at the place of matrimonial domicile, forecloses commencement of a subsequent maintenance action by the wife in another jurisdiction.

In *Estin* v. *Estin*, 334 U. S. 541, pp. 546-547, this Court apparently still considered the *Thompson* case good law. It made the very nice distinction, with which we are heartily in accord, namely, that in the *Thompson* case the wife was held to have forfeited her right to alimony under the laws of the martrimonial domicile, as distinguished from the *Estin* case, which involved a marriage where both the parties were domiciled in New York and New York was rightfully concerned that the wife be not left impoverished.

With all due respect, we do not think it is appropriate for this Court, by judicial fiat, to legislate a general proposition of survival of support which is contrary to the laws of the State having jurisdiction of the marriage. A change in the substantive support obligation of the marriage so as to make it survive the divorce in a proper case is one for Legislative enactment by the several States. It is not inherent in the common law. It is quite within the province of a State to legislate away alimony entirely.

The vice of this kind of judicial legislation is that the New York Legislature evidently presumed that this Court had laid down a rule of substantive law, which might universally be followed as such, to the effect that a husband's general duty to support the wife was a property right which necessarily survives any prior ex parte divorce decree rendered against her

A reading of the report of the New York Law Revision Commission, being Legislative Document (1953) No. 65K, shows this to be just the case. There was no recommendation that a change be made in the New York substantive law

with respect to continuing the general duty of a man towards his wife, after divorce, nor was any such legislation enacted. That document merely suggests a remedy to implement what it believed to be the effect of certain rulings of this Court. The majority opinion below appears to bear out this view (R. 544-546).

If an examination is made of Note 40, appearing at page 14 of that Legislative document, it also will be observed that the *Thompson* case erroneously was cited to the Legislature as a case in which there was a support order existing *prior* to the rendition of the divorce decree. Apparently the facts and legal force of the *Thompson* case were not even correctly considered by the Legislature in enacting Sec. 1170-b.

What the courts below have done is to accept the unrelated broad commentaries of this Court as a substitute for Legislative mandate. Our contention in this respect is reinforced, we believe, by the decision in *Fein* v. *Fein*, 261 N. Y. 441, where the Court below, under a comparable statute (Civil Practice Act, Sec. 1164) held that support could not be awarded the wife, if she be denied a separation.

Under Sec. 1170-b there is no change in the basic common law which confines to the duration of the marriage the husband's general duty to pay for his wife's necessaries and which long ago was translated into the statutory remedy of alimony. By Sec. 1170-b the New York Legislature now has created a posthumous remedy without any corresponding substantive duty. The remedy is made applicable only if there be a prior judgment in effect decreeing the termination of the marriage. It is the same as if the remedy of divorce were created to apply where no marriage existed.

That dilemma of Sec. 1170-b is underscored by its provision to the effect that after the separation has been denied because of the existence of a valid divorce decree, then the Court may award maintenance to the "wife" (whom it already has adjudicated is not the wife), "as justice may require".

We shall discuss under our due process point, that the phrase "as justice may require" is rather a vague premise upon which to base relief to a new end of post-marital support, having no foundation in the common law or the previously established public policy of the community. As was stated in *Ramsden* v. *Ramsden*, 91 N. Y. 281, there is no inherent power in the courts to award support to a wife apart from statute. No independent action for maintenance exists in New York, *Johnson* v. *Johnson*, 206 N. Y. 561. Thus, giving 1170-b the utmost liberal construction, it wholly fails of its purpose.

We return to the question, therefore, of what, then, is the nature of a husband's general duty of support which enabled the Court below to partition his divorce decree?

In *Romaine* v. *Chauncey*, 129 N. Y. 566, 570-571, the principle which obtains in New York was stated as follows: "During the marriage the husband owes to the wife the duty of support and maintenance although owing her no debt in the legal sense of the word; . . ." And the Court continued, when a judgment of divorce and alimony has been rendered against a husband, the allowance becomes a debt in the sense that the general duty has been measured and made specific by the Court, since ". . . the wife's right to alimony comes from the statute and not from the common law."

The general principles above stated in *Romaine* v. *Chauncey*, supra, were the subject of review by this Court and that case cited with approval in *Audubon* v. *Shufeldt*, 181 U. S. 575, 45 L. ed. 1009.

Again those principles were cited with approval in *Wetmore* v. *Markoe*, 196 U. S. 68, 73, 74; 49 L. ed. 390, 392, 393, where an award of alimony was defined by this Court as ". . . a penalty imposed for failure to perform a duty."

The rights of the wife at common law, as restated in *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456, 464-465, were, that

in the absence of a statute providing the means of alimony, the most that the wife could do was to go out into the market place and obtain necessaries upon her husband's credit. This latter expediency undoubtedly evolved out of the consideration that the wife should not be thrust upon the community as a public charge. 1 Schouler, Marriage, Divorce, Separation and Domestic Relations, (6th Ed. Blakemore, 1921) Sec. 83.

In dissecting the essence of this inchoate duty of support, comparison may be made with a wife's inchoate right of dower as generally understood at common law. There is a strong relationship between the two. It has been said that an alimony award may be made in lieu of dower. 2 Schouler, Marriage, Divorce, Separation and Domestic Relations, (6th Ed. Blakemore, 1921) Sec. 1825.

In *Randall* v. *Krieger*, 23 Wall. 137, 90 U. S. 137, 23 L. ed. 124, this Court, in reviewing the nature and incidents of the marriage relationship, states, in respect of dower, the following:

> "During the life of the husband, the right is a mere expectancy or possibility. In that condition of things the law-making power may deal with it as may be proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish or otherwise alter it or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor."

We say that similarly, the general duty of a husband to support his wife is a mere expectancy, it has not become vested or choate, and cannot be transformed into an alimony debt by any decree of a court made after the death of a marriage.

In *Ferry* v. *Spokane P. & S. R. Co.*, 258 U. S. 314, 66 L. ed. 635, at p. 318 (L. ed. p. 638), this Court stated the following:

> "Dower is not a privilege or immunity of citizenship, either state or Federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation; . . ."

Equally important, perhaps, in the *Ferry* case, is the holding by this Court that the State of Oregon had the complete right and power to terminate the wife's right of dower solely on the basis of her non-residence in the State. It necessarily follows, therefore, that the States of California and Nevada, which sanctioned the marital relationship and the obligations thereof and gave them life, had the same right to decree that they may be terminated upon the husband's ex parte divorce.

In his dissenting opinion in the Court of Appeals below, Judge Fuld finds Sec. 1170-b offensive to full faith and credit (R. 548). He distills with utmost clarity some of the basic points we make herein. He points out that a claim for support furnishes no foundation in itself for an independent cause of action in New York and that under the Nevada law, as in New York, the duty to support fell with the marriage dissolution. With sound logic, Judge Fuld points out that support, which in New York is a mere incident of the marital relationship and does not furnish the basis of a separate cause of action, ought not to be kept alive in New York with the deceptive appeal of the phrase "divisible divorce", by an adjudication in respect of a marital status which never existed in New York and which had been extinguished in another State having such jurisdiction.

Judge Fuld went on to point out that Mrs. Vanderbilt was not even domiciled in New York for one year prior to

her divorce and was thus ineligible to maintain a separation action as a married woman; and that to award support under Sec. 1170-b to a woman under those circumstances under the banner of "as justice may require" could not be done since there was no supporting New York public policy; and further, that only by confining the application of the statute to a wife who had standing to institute the matrimonial action at the time the foreign divorce was granted should New York arouse its interest and thus avoid unseemly conflicts between New York State and other jurisdictions.

Presiding Justice Peck, of the Appellate Division of the Supreme Court, in his dissenting opinion below (R. 539), also points out that the State of the wife's new domicile may not, subsequent to a valid divorce previously obtained by the husband in another State, create new alimony rights upon some theory of retaining a continuing surviving interest in the former wife's status.

Indeed, when New York enacted a statute requiring a husband to support his step-children, its courts held that such a statute would be arbitrary and unreasonable if construed to apply to a marriage contracted prior to its enactment and the husband thereby made liable for something which was not a prospective burden of the marriage. (*Matter of Kane* v. *Necci*, 245 App. Div. 1, app. dis. 269 N. Y. 13). With equal force and justice we believe it may be said that it is arbitrary and unreasonable to thrust the burden of post-marital support upon petitioner by the posthumous enactment of Sec. 1170-b.

POINT II

Section 1170-b is discriminatory, and petitioner was denied equal protection of the laws.

A. Foreign Divorces Are the Intended Target of Sec. 1170-b.

It is readily apparent that the intended legislative target was the foreign and not the domestic divorce. Sec. 1170-b only applies to marital judgments where no personal jurisdiction is obtained over the wife. Safely protected is the customary New York judgment of divorce procured through ready jurisdiction over both parties as domiciliaries. That section was not legislated to cure an evil arising out of ex parte New York divorces; no such evil was proclaimed to exist. Nor does it exist.

The irony of this entire point on discrimination is that the admitted single purpose of enacting Sec. 1170-b was to combat the effect of foreign ex parte divorce decrees upon New York wives. The whole of the New York Legislative Document (1953) No. 65 (K), is devoted to a discussion of the development of the law in this respect. The entire legislative inspiration for Sec. 1170-b was the dramatization of the plight of *New York wives* whose husbands depart to other jurisdictions and procure ex parte divorces before their wives secure a New York alimony award. (The other irony, of course, is that this plaintiff should have been considered a New York wife by the mere fact of her migration and even before she had completed the one-year domicile necessary for the maintenance of the action as a married woman).

Prefacing that Legislative Document is the express statement (p. 6) to the effect that the proposed legislation is necessary ". . . to protect a New York wife . . .", whose right to support may be cut off ". . . by an ex parte foreign divorce decree . . .".

We thus have presented, the mischief felt and the remedy in view, as evidence of legislative intent.

The stumbling block was, as revealed in that Legislative Document, that in *Estin* v. *Estin*, supra (334 U. S. 541, 552; 554; 92 L. ed. 1561, 1570, 1571), both Mr. Justice FRANKFURTER and Mr. Justice JACKSON expressed concern as to whether New York was giving less effect to the Nevada decree than it would give to its own judgments similarly situated. Therefore, in order to make the glove seem to fit the hand, Sec. 1170-b was made to appear to be silent in respect of its direction to out-of-State decrees. That silence is meaningless. That statute does not and cannot have any real effect upon a New York judgment of similar nature.

It would be sheer folly for any attorney in New York, in the face of a valid New York ex parte judgment dissolving the marriage, to place on file a perjurious complaint by which he claims that the woman is still married and seeks a separation from bed and board.

It also is a vital point of discrimination that under the comparable wording of Civil Practice Act, Sec. 1164, if a New York woman, who is not divorced, loses her separation action, she may not be awarded alimony. *Fein* v. *Fein*, supra (260 N. Y. 441). Anomalous, therefore, is the award under Sec. 1170-b when she has been divorced.

This case is rife with prejudice against the non-resident man. When Mrs. Vanderbilt chose to come to New York it became impossible for Mr. Vanderbilt, upon his return to the original matrimonial domicile, to secure personal jurisdiction over her in Nevada. Mr. Vanderbilt's lack of ability to secure his wife's presence in the Nevada action has been made a defeating weakness by the Court below in its application to Sec. 1170-b. It would compel him to come to New York and defend his right upon a new field of combat chosen by the woman after the marital battle is over. It even failed to deem the plaintiff estopped by her futile

attempt in the first separation action to enjoin the Nevada proceedings.

Plaintiff was given sanctuary and immunity from everything prejudicial to her. New York deprived defendant of his right to equal protection of the laws.[6]

B. The Nevada Decree Was Made Less Conclusive Than A Similar New York Judgment.

Concededly, a reading of the form of Sec. 1170-b makes it appear quite innocent in respect of the point we make here. The substance is quite the contrary.

The formal language of Sec. 1170-b is to the effect that where the wife maintains a New York separation action wherein the separation is denied because of a judicial finding that a judgment of divorce has been previously granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, separate maintenance nevertheless then may be granted.

In effect, we are told below that according to Sec. 1170-b, if a New York husband obtains a valid ex parte judgment of divorce in New York against his wife, the conclusiveness of that adjudication may be disregarded by the Court which rendered it, that it is of less force than any other judgment, and is amenable to a subsequent separation action by the wife in New York. That ruling is an erroneous invasion of the common law and is contrary to statute. It has never been applied to any other judgment. There is rigid application in New York to the effect of a judgment, which is defined in Civil Practice Act, Sec. 472, in part as follows: "A judgment is the determination of the rights of the parties in an action; . . . "

It is the well-settled law of New York, and indeed the prevailing rule in most American jurisdictions, that such a

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[6] *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 511; 83 L. ed. 1423, 1434.

prior New York judgment is conclusive upon the merits until set aside. The New York statutes to which we previously have referred herein require that there be an existing marriage upon which to found an action for a separation. There is nothing in Sec. 1170-b which would make subordinate the conclusiveness of such a prior New York judgment terminating the marriage. Sec. 1170-b points to an action for a separation and perhaps impliedly invites an attack upon the prior divorce, but it does not legislate away the conclusive effect of the New York divorce judgment.

As was stated in *Herpe* v. *Herpe*, 225 N. Y. 323, at p. 327, the courts cannot, by amendment, change a judgment or limit its legal effect to meet some equity subsequently arising. Errors, in substance, must be corrected either by vacating the judgment or by appeal.

In *Gysin* v. *Gysin*, 263 N. Y. 509, the Court held that after two years, a judgment of divorce rendered by default even, could not be vacated for any reason, except for fraud.

We believe it inevitable that the New York courts would dismiss at the outset as barred by res adjudicata an action commenced by a woman for a separation, subsequent to an ex parte New York divorce judgment rendered against her. She would first have to secure the vacating of the divorce judgment, or, in her own action, impeach the divorce judgment as having been fraudulently procured. She could not let it stand as an adjudication that she is no longer married and then proceed to disregard it by commencing a separation action.

With all due respect to the majority in the Court of Appeals, its opinion begs this question. It says Sec. 1170-b has changed the policy of denying alimony where no marriage exists and further that the severance of the marital ties by foreign judgment is given the same recognition as such a severance in New York. (R. 547) The Court below does not state that a similar prior New York judgment of divorce could be made subject to a subsequent New York

separation suit and a judgment entered therein awarding maintenance under 1170-b. As we have shown above, the latter plainly could not be accomplished.

It is also important to remember that there is no law in New York which permits a maintenance award to a woman if she fails to obtain a judicial separation or a divorce against her husband. Not even if it be felt that justice required it, could the woman be awarded support under those circumstances. On the other hand, if the husband obtains a valid foreign ex parte divorce against the wife, he is susceptible to 1170-b.

C. The Sequestration of Defendant's Property As a Basis for Jurisdiction To Make Awards Necessarily Was Discriminatory.

The petitioner's special appearance contesting the jurisdiction of the Court over his person has been sustained by all the courts below. (R. 505, 538, 541) This ex parte separation action, commenced by publication, wrongfully has been attached to defendant's New York assets because of the refusal by the courts below to give effect to the Nevada excision of his former wife's alleged economic interest in the marriage.

The sequestration of the petitioner's property was made under N. Y. Civil Practice Act, Sec. 1171-a, and the publication of the summons commencing the action, under Civil Practice Act, Secs. 232, 232-a(5). The provisions of law generally upon which the plaintiff founded her right to commence this separation action by publication and to seek the various awards made to her, had their basis solely in the fact that petitioner, as defendant therein, was a nonresident of New York and a citizen of Nevada. If it had been a New York husband who had procured a New York divorce judgment, the subsequent separation action could not have been so commenced by publication and his property thus sequestrated for the purposes of supporting prospective alimony

awards. It should have been necessary that the Court below have before it a marital *res* as a basis for the seizure.[7] But, the Court below found that there had been no actual *res* in New York founded upon the matrimonial domicile of both parties (R. 546). And then it found that no marital *res* existed.

How, then, can it be said, that what happened to Mr. Vanderbilt could happen to any New York husband or former husband who obtains a similar New York *ex parte* divorce? It is impossible, and simply could not be done. New York has imposed an affliction upon petitioner purely and solely because he is not a citizen of New York State. The price of the cure possibly was that he submit personally to New York's jurisdiction. This he could not and would not do.

It should be observed that the bulk of the sequestrated property consists of inalienable income from trusts established by his ancestors and of other property in the course of estate administration, and that it was not property voluntarily reposed by the defendant in New York (R. 6, Pl. Ex. 29; R. 356). The statute has been oppressively applied. We respectfully submit that this grave situation calls for emphatic correction by this Court before it spawns a national dilemma of state conflict.

POINT III

Petitioner was denied due process of law.

The denial of due process herein, in brief, falls into three principal categories: (A) Insufficient notice of objects and purposes of action; (B) deprivation of right to meet plaintiff's charges of misconduct and resulting judicial finding of misconduct on defendant's part; and (C) the vague and indefinite statute under which relief was granted.

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[7] *Geary v. Geary*, 272 N. Y. 390.

A. Lack of Proper Notice.

As we have indicated hereinbefore, neither in the summons, nor the papers upon which publication of the summons was effected and defendant's property sequestrated, nor in the complaint, was there any mention made of the existence of the prior Nevada decree. Nor was any warning given that a divorced woman would seek alimony under a revolutionary concept of law.

As this Court held in *Mullane v. Central Hanover B. & T. Co.*, 339 U. S. 306, 314; 94 L. Ed. 865, 873, the notice must be of such nature as reasonably to convey the required information.

The complaint, classic in form, merely called for a separation of married parties and the statutory award of alimony in connection therewith (R. 12). The summons itself bore the statutory warning,[5] "Action for Separation" (R. 11). Nevertheless, a different kind of judgment was entered in the action than called for by the complaint, which, in its body and its prayer for relief, requested support for a married woman upon obtaining a separation and did not request support for a divorced woman upon a denial of the separation.

When the Court sequestrated defendant's property and appointed a receiver, it did not know that he had divorced plaintiff (R. 5). If it had, it obviously could not have so acted without an attack upon the divorce decree. (Civil Practice Act, Sec. 1171-a).

Proper procedure should have required that plaintiff, in commencing a separation action as a married woman, plead an attack upon the prior Nevada decree. Sec. 1170-b did not require it and defendant did not know what was going on until he made his preliminary probing motion to dismiss the action for lack of jurisdiction of the subject

[5]Civil Practice Act, Sec. 1167.

matter and of his person. There was nothing in the process initiating the action which gave defendant warning that the divorce decree, the obtaining of which plaintiff unsuccessfully had sought to enjoin in her prior separation action, again would be the subject of attack under some revolutionary concept of law not defined in Sec. 1170-b and only evolved by judicial operation in this action at a costly price to petitioner.

The majority below brushed this contention aside on the theory that the statute itself was sufficient notice that an award of maintenance might be made (R. 548). Just how defendant a non-resident, was supposed to be apprised of this possible result by a newly enacted statute which is also silent in this respect, especially when no attack upon his divorce decree is pleaded, was not explained.

When Special Term below denied defendant's preliminary motion to dismiss, (*Vanderbilt* v. *Vanderbilt*, 133 N. Y. S. 2d 314, 316), it made the startling pronouncement in its opinion (p. 316) to the effect that the Nevada decree could be given no effect in New York until made a judgment there, and that plaintiff was not required to anticipate its assertion. The Court then proceeded (pp. 316-317) to discuss defendant's anticipatory fears expressed upon the motion, that plaintiff might assert rights under Sec. 1170-b, and the Court stated that plaintiff does not deny that she may rely upon it.

Genuine doubt existed. Defendant was required by the very nature of plaintiff's procedures to search out the objects and purposes of her action, and the entire burden was thrust upon him to define and anticipate the same. At least the Court permitted defendant to preserve his special appearance and objections to jurisdiction by answer, without waiver of the same (R. 19). The Court of Appeals sustained petitioner's right to defend the action upon the merits, without waiver of those objections to jurisdiction (R. 541).

There was no way in which defendant was apprised at the outset that plaintiff would seek relief as a divorced woman, and contrary to the holding below, the statute did not fill that gap. It is not reasonable to say that defendant should have dismissed from his mind the established legal effect of his Nevada decree as universally understood, and should have anticipated that once a summons bearing the notice "Action for Separation" is served upon him and his property sequestrated for such purposes, that anything but that might happen to him in the action.

As was held in *Hay* v. *Tuttle* 67 Minn. 56, 58-59, (69 N.W. 696) the purposes of attachment must be the claim upon which it was granted; and that, ". . . Courts should be very careful to prevent the enforced appearance of a nonresident on one purpose being used for some other and ulterior purpose."

If defendant had defaulted [illegible] pearance, only a judgment of separation and alimony [illegible] have been awarded against him. The issue was improp[illegible] ubstituted against a non-resident over his protests. *Coe* [illegible] *rmour Fertilizer Works*, 237 U. S. 413, 424; 59 L. ed. 10[illegible] 1032.

B. Denial of a Fair Trial.

One would think that in the absence of any previous experience and the failure of Sec. 1170-b to instruct upon procedure, the interests of substantial justice would have required that at least the trial Court chart a fair course of trial, as was requested by defendant's counsel, and that the Appellate Courts below would not have approved that omission.

Defendant's counsel literally did not know how to proceed, and he was not only refused guidance by court and statute, but actually deprived of a right of defense to meet plaintiff's testimony on defendant's alleged misconduct.

Of course, we are faced with a basic contradiction, in that the Nevada decree was supposed to have been conclu-

sive on everything except jurisdiction, and was supposed to have finally severed the marital tie because of the woman's misconduct. Nevertheless, in order to sustain an award under Sec. 1170-b upon the theory that justice required it, the Courts below proceeded to make a finding of misconduct on defendant's part in contravention of the Nevada decree (R. 537-538, 547).

In brief, the following is what happended upon the trial:

The trial Court denied defendant's counsel's opening motion for a separate and prior trial of the issue of the validity of defendant's Nevada domicile as raised by the defense contained in his answer (R. 26-30). The Court gave as its reason for such denial, that by the taking of testimony on defendant's alleged marital misconduct together with that concerning his Nevada domicile, the result is accomplished that if the defense be sustained, then testimony as to misconduct would be stricken out, and defendant ". . . has suffered nothing" (R. 39). The trial then proceeded with plaintiff's testimony as to defendant's alleged misconduct.

During the course of plaintiff's *prima facie* case, defendant's counsel asked the Court to define what justice required with respect to maintenance, and the Court declined to consider the question at the time (R. 222-223). When plaintiff rested her *prima facie* case, and defendant's motion to dismiss was made, the Court indicated that the trial would proceed on "the financial" and in the event the Court *did not* sustain the Nevada decree that then defendant could answer the charges of misconduct (R. 341-342).

The trial Court thereby expressly prescribed its procedure. It dismissed the complaint "upon the merits" (R. 344) and stated that it would take proofs of "income and earnings" and other pertinent "information" on the issue of maintenance (R. 345). The trial Court made it clear that in so far as the dismissal of the complaint was concerned, that dismissal related to the part of the action based on

defendant's alleged misconduct and that in so far as the balance of the relief was concerned, the trial was continuing only for the purpose of taking testimony as to income and resources and other incidental information necessary in connection with the claim of maintenance and support (R. 349).

Again, defendant's counsel objected that Sec. 1170-b provided no standard or measure whatsoever for the application of justice, and requested that the trial Justice should give the defendant a statement of what requirements were to be met in the application of the phrase "as justice may require" under Sec. 1170-b (R. 350). The Court refused to do so and said in effect that since the statute furnished no guidance the Court must use its discretion and must take testimony as to what plaintiff considers is necessary for her maintenance and overruled defendant's counsel's objection that he did not know now to proceed on the question (R. 351-352).

When the trial Court rendered its second decision awarding plaintiff maintenance under Sec. 1170-b, it reiterated, at the very outset of its opinion, that after the dismissal ". . . the proof of the parties was taken as to their finances, income, and plaintiff's needs, . . ." in the event the issue of maintenance under 1170-b was resolved in her favor (R. 506). Clearly, defendant by this series of rulings, was completely deprived of a full, fair and reasonable opportunity to meet and answer plaintiff's testimony as to his alleged misconduct and was denied the right to show that justice did not require an award of maintenance.

With the dismissal of plaintiff's complaint fell all the charges of misconduct. Nothing remained upon which the trial or appellate courts could rest a finding that defendant's misconduct justified awards to plaintiff.

The trial Court had consistently ruled, as above indicated, that only if the Nevada decree was set aside, would defendant's alleged misconduct be in issue, and that the

sustaining of the decree resulted in a continuance of the trial only for the purpose of taking further testimony on the financial aspects of plaintiff's claim: Just what was the defendant supposed to do under those circumstances? Even without such rulings of the Court, how could he proceed to offer testimony in justification of his own conduct and of freedom from mischief if plaintiff's complaint charging him with the offense already had been dismissed? That dismissal "upon the merits" terminated the phase of the action in which plaintiff asked for a separation based upon his alleged misconduct. That issue was resolved. There was nothing for him to meet in that respect.

Apparently, the sole test of why justice required that plaintiff be awarded maintenance, was that plaintiff is a woman and defendant is a man and he had divorced her. As we stated in our petition, equity has followed the woman and not the law.

The denial of a clear right and opportunity to the defendant to meet the plaintiff's charges of misconduct was an unequivocal denial to him of due process of law. Unjust were the awards to plaintiff under those circumstances and unjust was the additional finding of misconduct on defendant's part founded upon such a record."

C. "As Justice May Require" Was Not Defined.

This is a vague and indefinite basis upon which to found a new remedy revolutionizing the opposite principle previously entrenched in the public policy of New York and most other jurisdictions, that no duty of support survived the divorce. Its very vagueness renders the statute void.[9] There are serious penalties attached to failure of compli-

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[9] *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673; 74 L. ed. 1107; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168; 77 L. ed. 231, 239.

[10] *Connally* v. *General Construction Co.*, 269 U. S. 385; 70 L. ed. 322.

ance with support orders.[11] The basic statute from which the punishment springs should be very explicit.

If a woman be no longer married, she cannot pledge a former husband's credit for necessaries on the theory of an implied agency furnishing the legal basis therefor. This was the foundation for the alimony statutes. Sec. 1170-b has no substantive foundation. Its operation depends upon the intervening conjecture of the judicial mind as to what justice may require.

In any other separation case the wife must prove the husband's misconduct by a fair preponderance of the evidence. This apparently is not so where she has been divorced. Then she only need prove so much of the husband's misconduct as will satisfy the emotional requirements of justice.

The failure of the trial Court to meet the demands of defendant's counsel that the requirements of justice and the procedure thereunder be defined, and the actual denial to defendant of the right to r[illegible]st plaintiff's charges of misconduct, reiterates the defeat of due process in this action by a combination of judicial and statutory commission and omission.

Sec. 1170-b plainly encompasses hit-or-miss procedures.

Conclusion

New York Civil Practice Act, Section 1170-b, as applied in this case, should be held to violate the Federal Constitution and to be void.

The judgment entered in the New York County Clerk's office on March 31, 1955, as thereafter affirmed by the New York Court of Appeals on May 31, 1956, which makes decretal findings and directions and monetary awards in favor

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[11] *Park* v. *Park*, 80 N. Y. 156.

of respondent Patricia W. Vanderbilt, should be modified by striking the same therefrom and by denying said respondent relief under Civil Practice Act Sec. 1170-b; and by vacating or terminating the order entered in said Clerk's office on April 21, 1954 appointing the respondent Thomas F. McCoy, Esq. as Receiver and Sequestrator of petitioner's property; and by directing him to finally account to petitioner for his acts and transactions as such.

Dated: March 15, 1957.

Respectfully submitted,

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APPENDIX

New York Civil Practice Act:

Sec. 232(1). (Extract) **In what actions order for service of summons by publication may be made.** An order directing the service of a summons upon a defendant, by publication, may be made upon the application of the plaintiff, as specified in sections two hundred thirty-two-a and two hundred thirty-two-b of this act, in any of the following actions:

1. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation. * * * *

Sec. 232-a(5). (Extract) **Persons against whom order for service of summons by publication may be made.** The order may be made where in a cause of action specified in section two hundred thirty-two of this act, the defendant . . .

5. Is a natural person and is not a resident of the state; or * * * *

Sec. 1161. (Extract) **Action for separation; when maintainable.** An action may be maintained by a husband or wife against the other party to the marriage to procure a judgment separating the parties from bed and board, forever, or for a limited time, for any of the following causes: * * * *

Sec. 1164. **Maintenance of wife and children in action for separation.** Where an action for separation from bed and board is brought by the wife, the court, in the final judgment of separation, may give such directions as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage and for

the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties. And the court, in such an action, may render a judgment compelling the defendant to make the provision specified in this section where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation. * * * *

Sec. 1165-a. (Extract) **Conditions attached to maintenance of action for annulment or separation.** An action to annul a marriage or for separation may be maintained in either of the following cases:

1. Where both parties are residents of the state when the action is commenced. * * * *

3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced, and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action.

Sec. 1166. **Residence of married woman in action for divorce or separation.** If a married woman dwells within the state when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere.

Sec. 1171-a. (Extract) **Sequestration of defendant's property in action for divorce, separation, or annulment where defendant cannot be personally served and there is property within the state.** Where in an action for divorce, separation, annulment or declaration of nullity of a void marriage it appears to the court that the defendant is not within the state, or cannot be found therein, or is concealing himself therein, so that process cannot be personally served upon him, the court may at any time and from time

to time make any order or orders without notice directing the sequestration of his property, both real and personal and whether tangible or intangible, within the state, and may appoint a receiver thereof, or by injunction or otherwise take the same into its possession and control. The property thus sequestrated and the income therefrom may be applied in whole or in part and from time to time, under the direction of the court and as justice may require, to the payment of such sum or sums as the court may deem it proper to award, by order or judgment as the case may be, and during the pendency of the action or at the termination thereof, for the education or maintenance of any of the children of a marriage, or for the support of the wife, or for her expenses in bringing and carrying on said action and the proceedings incidental thereto or connected therewith; and if the rents and profits of the real estate, together with the other property so sequestrated, be insufficient to pay the sums of money required, the court, upon such terms and conditions as it may prescribe, may direct the mortgage or sale of sufficient of said real estate to pay such sums. * * * *